

No. 46330-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
DEPUTY

STATE OF WASHINGTON

Respondent

vs.

BRIAN DeLISLE

Appellant

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ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY  
The Honorable Daniel Stahnke  
Superior Court No. 11-1-01448-7

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APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

- A. Mr. DeLisle did not receive effective assistance of counsel leading up to the entry of his guilty plea.

The state does not appear to dispute that the Sixth Amendment right to counsel includes the plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citing *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993)); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). See also, *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P. 3d 956 (2010). A court reviews a claim of ineffective assistance of counsel *de novo*, since it involves mixed questions of law and fact. *State v. A.N.J.* at 109.

1. Defense counsel did not conduct any investigation or interview witnesses.

The state appears to argue that Mr. DeLisle's lawyer had no duty to interview potential witnesses as part of his investigation of his client's case:

Interviewing witnesses would not have changed the outcome of the case; and when negotiating a plea agreement there are tactical reasons why defense counsel may choose to forego conducting witness interviews. Resp. Br at 17.

The state also claims that Mr. Trejo did not fail to interview witnesses. This claim is not borne out by the record. Trejo testified that he did not interview *anyone*, neither potential defense witnesses nor any prosecution witnesses. RP 75, 77.

The ABA standards for the defense function, cited in Appellant's opening brief at 13 and 14, make it clear that the duty to investigate "exists *regardless* of the accused admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." ABA Standards, 4-4.1. (Emphasis added). Defense counsel here was obligated to investigate the potential alibi witnesses notwithstanding his client's statement that Mr. DeLisle thought he could drive because of an arrangement with the police to drive an informant around. RP 76. Moreover, since counsel never interviewed the arresting officer, he had no idea whether there were weaknesses in the officer's ability to identify the driver of the car he had been pursuing, who was not arrested at the scene. Significantly, the state gives no reason why it would be sound tactics *not* to interview potential witnesses, either for the prosecution or the defense.<sup>1</sup>

The state cites no cases which would relieve counsel of the duty to investigate potential defenses. The duty is clear in Washington through a long line of cases, all cited in Appellant's opening brief at 14: *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). See also: *State v. McSorley*, 128 Wn.App. 598, 605-10, 116 P.3d 431 (2005)(Failure of defense counsel to investigate child luring defendant's claim that he was where he was in order to make a doctor's appointment rather than trolling to lure children where, after trial, evidence is shown that defendant did have such an appointment is ineffective assistance;)

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<sup>1</sup> There was no indication in this record that Mr. Trejo was inhibited from doing any witness interviews as a condition of the plea bargain.

Accord: *Lord v. Wood*, 184 F. 3d 1083 (9<sup>th</sup> Cir. 1999)(failure of counsel to personally interview witnesses constitutes ineffective assistance of counsel). Appellant submits that his lawyer's performance was deficient, and that this prejudiced him because his lawyer never evaluated the strength of the state's case by conducting his own investigation, leaving him no other option but to enter a plea.

2. Trial counsel did not investigate his client's mental health before the entry of the plea.

The state argues that Mr. Trejo had "no reason to suspect" that his client had mental health issues in the lead up to the plea hearing. Resp. Br. at 18. This is not borne out by the record. Trejo knew that his client had suffered a closed head injury. RP 61-2, 73. This was information he had when he was first hired. However, he never talked with Mr. DeLisle's psychologist about this. He was also aware that Mr. De Lisle was not getting his prescribed medications in the jail. RP 74. One of these medications, Risperidone, is an anti-psychotic drug, used to treat, among other things, schizophrenia.

Declaration of Brandy Jeffers, CP 28 *et. seq.* Trejo's testimony at the hearing on the withdrawal of the plea that he was unaware that Mr. DeLisle had been having seizures while in the jail in the month before the plea was directly contradicted by his own earlier statements during the plea hearing itself that he was aware Mr. DeLisle had been having seizures while in custody before the trial date and suffered from "acute psychosis" and "paranoid delusions."

RP 10. The trial court's finding (FOF 12 K) that Mr. Trejo had no reason to believe Mr. DeLisle was incompetent is not supported by substantial evidence.

One of the aftereffects of a *grand mal* seizure is memory loss and confusion which may continue for hours or days afterward. RP 105. While it may have been Mr. Trejo's impression that Mr. DeLisle was not actively psychotic at the time of their consultation in the jail before the plea, he did have reasons to be concerned about his client's mental state. He apparently did nothing to investigate further, despite this information. This was ineffective assistance of counsel under current Washington law.

Our Supreme Court has recognized that when counsel is aware, *or should be*, that his client has mental health issues that may impact his ability to make decisions about the case, there is a duty to make further inquiry. *Personal Restraint of Brett*, 142 Wn.2d 868, 142 P.3d 16 (2001); *Personal Restraint of Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001). In *Fleming*, the court vacated the plea based on the mere fact that Fleming's lawyers had not brought to the court's attention the possibility that the client may not have been competent to enter the plea. More recently, in *State v. Fedoruk*, \_\_\_\_ Wn. App. \_\_\_\_, 339 P. 3d 233 (Dec. 2014), the Court of Appeals reversed a murder conviction because trial counsel had not done a timely investigation of a possible mental health defense. The court noted that Fedoruk's counsel's failure to investigate a possible mental health defense to the charges impacted the client's ability to make an informed decision about proceeding to trial with

a general denial defense despite strong circumstantial evidence. Slip Opinion at 13.

The cases outlined above show both that a lawyer has a duty to investigate the mental health of his client, and that failure to do so is ineffective assistance which prejudices the client's case. In the present case, at the very least, Mr. Trejo should have continued the plea hearing until he could consult with Mr. DeLisle's treating physician to determine whether the recent seizures and absence of proper medication affected his ability to comprehend the court procedures he was about to undergo.

This court should hold that Mr. DeLisle did not receive effective assistance at the time of his plea of guilty, and remand with directions to the trial court to grant the motion to withdraw the plea of guilty.

B. The trial court abused its discretion in finding that Mr. DeLisle was competent to enter the plea of guilty.

The state argues that Mr. DeLisle did not meet his evidentiary burden to show he was incompetent to plead guilty and that the trial court's conclusion to that effect should be affirmed. Resp. Br at 20.

As argued in Mr. De Lisle's opening brief, the burden of proof is given to the party seeking to establish incompetency. *State v. Coley*, 180 Wn.2d 543, 326 P.3d 702 (2014). The burden is by preponderance of the evidence, not "substantial evidence", the standard applied by the trial court. A trial court abuses its discretion when it applies the incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 71 P.3d 638 (2003).



The competency standard for pleading guilty is the same as the competency standard for standing trial. *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L.Ed. 2d 321 (1993). At the motion to withdraw his plea, Mr. DeLisle had only to show, by a preponderance of the evidence, that he was not competent to enter the plea. He did not have to meet the higher evidentiary burden imposed by the trial court. This court should hold that Judge Stahnke, who ruled that Mr. DeLisle was competent at the time of the entry of the plea, abused his discretion by applying the wrong legal standard.

Even assuming there was a higher burden of proof, the trial court also abused its discretion in ruling on this mixed question of law and fact that Mr. DeLisle was competent to enter the plea. The only expert testimony presented by either side, that of Dr. Larsen, established that Mr. DeLisle was not competent to enter the plea. The record established that he had a head injury of long standing that continued to have effects. The record established that while he was in the jail, had not been getting the anti-psychotic medicines prescribed for him. The record established that only days before the plea hearing, he had suffered a *grand mal* seizure. He had also been experiencing auditory hallucinations while in custody. None of these facts were in dispute, and all call into question the trial court's conclusion on the competency issue.

The trial court's conclusion was based heavily on its review of the audiotape of the plea hearing, in which Mr. DeLisle makes mostly monosyllabic mechanical responses to the leading questions of the judge

conducting the hearing, Judge Melnick. This was the approach taken by the trial courts in both *State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001) and *Fleming, supra*. In both cases, the Supreme Court remanded for further proceedings. In *Fleming*, the remand was because trial counsel had not brought to the court's attention the *possibility* that Fleming was not competent to enter his plea.

The state cites *State v. DeClue*, 157 Wn. App. 787, 239 P.3d 377 (2010) in support of its argument that the trial court's decision here is correct. *DeClue* held that the trial court did not err in failing to hold a formal competency evaluation as part of DeClue's motion to withdraw his plea. The court did so on the basis that DeClue presented "no credible evidence" that he did not have the ability to understand the consequences of pleading guilty.

*DeClue* is readily distinguishable. He had no previous history of mental illness, unlike Mr. DeLisle. He was taking his medications before the plea hearing, unlike Mr. DeLisle. He presented no medical testimony from a psychiatrist, unlike Mr. DeLisle. In fact, there was medical testimony in DeClue that he was *not* impaired by the medications he was taking, which was the core of his claim. And finally, unlike DeClue's lawyer, who had not noted any signs of mental impairment, Mr. Trejo had told the original trial judge during the plea hearing that his client had suffered seizures while in custody before the plea hearing, and suffered from "acute psychosis" and "paranoid delusions." The state's reliance on *DeClue* is misplaced. On this record, the trial court erred in determining that Mr. DeLisle was competent to enter his plea

of guilty.

## II. CONCLUSION

Mr. DeLisle established that he did not receive effective assistance from Mr. Trejo at the time of the entry of his plea. His lawyer had not interviewed any of the defense witnesses he had identified. Nor had he interviewed the prosecution's witnesses. The failure to fully investigate the case undermines confidence in the validity of the plea.

More importantly, Mr. Trejo was aware of the fact that his client had a history of mental illness due to his closed head injury, and moreover had recent indications of mental illness due to his hallucinations on jail, and his seizures. The failure to fully investigate his client's mental health at the time of the plea also undermines confidence in the validity of the plea.

Even assuming that Mr. Trejo did render effective assistance during the proceedings leading up to the plea, Mr. DeLisle established by at least a preponderance of the evidence that he was not competent to enter the plea due to his mental health issues. The trial court applied the wrong burden of proof on this issue, thus abusing its discretion, and also ignored the psychological evidence provided by the only expert witness in reaching its conclusion.

This court should hold that Mr. DeLisle did not receive effective assistance of counsel regarding his decision to enter the plea, and also that he was not competent to enter the plea at the time. The court should reverse the trial court and order the withdrawal of the guilty plea.

Dated this 18<sup>th</sup> day of FEBRUARY, 2015

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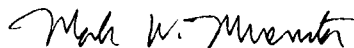
Appellant.

NO. 46330-0-II

CERTIFICATE OF SERVICE  
FOR APPELLANT'S  
Reply Brief

I hereby certify that I caused to be served a copy of: APPELLANT'S Reply Brief upon Rachael Probstfeld, counsel for respondent, by hand delivery to the Office of the Clark County Prosecuting Attorney, on the 18th day of February, 2015 with postage fully prepaid.

Dated this 18<sup>th</sup> day of February, 2015



Mark W. Muenster